United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig

75-7423

To be argued by
JOHN J. MACCHIA

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARY ANNE GUITAR,

Plaintiff-Appellant,

—against—

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE BROADCASTING CO., INC. (DEL.), H. PAUL JEFFERS, ROBERT MARTIN CORPORATION, ROBERT WEINBERG, MARTIN BERGER, JOHN YETTI, MARGARET MIGLIORE SCHNEIDER and GERALD DAVID LLOYD,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE ROBERT L. CARTER, DISTRICT JUDGE

BRIEF FOR DEFENDANTS-APPELLEES WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE BROADCASTING CO., INC. (DEL.) AND H. PAUL JEFFERS

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STATEMENT OF THE ISSUES

Plaintiff-appellant appeals from an order of Judge Carter dated June 17, 1975 and a judgment entered thereon dated June 30, 1975 in the Southern District of New York, granting the motions of all defendants for summary judgment dismissing the consclidated action for alleged defamation

and conspiracy to violate the "payola" sections of the Communications Act of 1934. The District Court's opinion is reported at 396 F. Supp. 1042-1057. This brief is submitted behalf of defendants Westinghouse Electric Corporation ("Electric") and Westinghouse Broadcasting Co., Inc. (Del.) ("Broadcasting"), hereinafter collectively referred to as the "Westinghouse defendants", and defendant H. Paul Jeffers ("Jeffers") in support of the affirmance of the summary judgment granted them by the District Court.

The claims of defamation are based on two separate and distinct publications. The one asserted against the Westinghouse defendants and Jeffers is predicated upon the broadcast of Jeffers' book review of plaintiff's book, Property Power, on December 17, 1972 over radio station WINS. The text of the book review as broadcast is set forth on pages 6-7 of the plaintiff's brief (see also A15-16*). The other claim asserted against all defendants other than Jeffers and the Westinghouse defendants is predicated upon the publication on December 20, 1972 of a printed reproduction of the book review which also contained quotations allegedly attributed to plaintiff. The third claim asserted against all defendants alleges a conspiracy to violate

*References are to the Joint Appendix

Sections 317, 501, 502, 503 and 508 of the Communications Act of 1934.

Plaintiff's nine item statement of the issues is basically improper and certainly misleading. Indeed, it assumes the existence of the very conspiracy relevant evidence of which she was required but utterly failed to adduce in the District Court. Rather, as framed by the claims below and the findings of the District Court, the relevant issues presented for review here of the judgment granted the Westinghouse defendants and Jeffers are as follows:

(1) Did the District Court correctly hold as a matter of law that the alleged defamatory book review by Jeffers was opinion of plaintiff's book and hence non-defamatory of plaintiff?

(2) Did the District Court correctly hold as a matter of law that said review was fair comment upon plaintiff's book and therefore non-actionable?

(3) Did the District Court correctly hold as a matter of law that defendants' constitutional privilege mandated the granting of summary judgment to the defendants?

(4) Did the District Court correctly hold as a matter of law that since plaintiff had failed to satisfy her burden of showing specific evidentiary facts giving rise to a genuine issue of material fact as to whether defendants were motivated by malice, summary judgment must be granted on both fair comment and First Amendment grounds?

(5) Should plaintiff's claim of conspiracy to violate Sections 317, 501, 502, 503 and 508 of the Communications Act of 1934 be dismissed in view of plaintiff's failure to set forth any admissible evidentiary facts which could raise a genuine issue of material fact as to said claim, particularly in light of plaintiff's concession that she has no such facts?

(6) In all events, did the District Court correctly rule that plaintiff has no private right of action under the sections of the Communications Act upon which she predicates the claim of alleged conspiracy?

STATEMENT OF THE CASE

Initially, we point out that plaintiff's "Statement Of The Case" and its "Facts" as set forth in her

Appellant's Brief do not state the relevant facts of this case, a mere libel suit. Rather, plaintiff simply repeats the same elaborately contrived and fanciful conclusion of a conspiracy with no basis in fact, which was presented to and rejected by the District Court (A 325-328). Plaintiff's failure to set forth admissible evidentiary facts to support her incredible claim, highlighted by her misguided designation of mere speculation and argument as "evidence", fully warranted summary dismissal of her claims by the District Court and requires affirmance of the judgment granted Jeffers and the Westinghouse defendants.

The nature of this case and the proceedings in the District Court are as follows: The first action (73 Civ. 161) was brought against all defendants with the exception of defendants Lloyd and Schneider. Plaintiff's second action is alleged against the latter two defendants (73 Civ. 5287). These actions were consolidated with the principal action for all purposes by order of Judge Carter dated April 15, 1974.

Pursuant to the motion of Jeffers and the Westinghouse defendants for summary judgment under Rule 56(b), the District Court, by opinion and order dated June 17, 1975, dismissed the second amended complaint on grounds of fair comment (A 324), constitutional privilege (A 332) and

no private right of action under the federal Communications Act (A 334). Pursuant to cross-motions of the remaining defendants for summary judgment, the District Court dismissed all claims asserted against said defendants in each of the two actions.

STATEMENT OF THE RELEVANT FACTS

Contrary to plaintiff's elaborate recitation of speculative arguments concerning an imagined conspiracy - erroneously characterized as "facts" or "evidence" - the relevant facts in this action are simply stated and, as properly found by the District Court, present no genuine issue of material fact. These uncontested facts appear in the various supporting affidavits of the defendants (A 132-139, A 149-154, A 167-171, A 182-184) and are also briefly summarized in the District Court's opinion (A 304-309). The record evidence, the undisputed facts and the findings of the District Court all show:

Defendant Broadcasting owns and is the licensee of radio station WINS in New York City (A 135). It is a wholly-owned subsidiary of Westinghouse Broadcasting Co., Inc., (Ind.), an Indiana corporation which in turn is a wholly-owned subsidiary of defendant Electric (A 138). Defendant Jeffers, at the time of the broadcast of the review, was a full time news editor employed by radio station

WINS and had been so employed since June 1, 1969 (A 132). Defendant Yottes was a sometime casual employee at WINS prior to December 3, 1972 and subsequent to February 2, 1973 (A 136). He was not employed in any capacity by WINS at the times alleged in the claims herein (A 136-137).

Defendant Robert Martin Corporation is a real estate developer and a New York corporation with its office in Elmsford, New York, engaged in the construction and development of a project in Weschester County known as Tarrygreen (A 305). The remaining defendants are either officers or employees of Robert Martin Corporation.

On Sunday, December 17, 1972, defendant Broadcasting, over its radio station WINS, broadcast as part of its regular news features of public interest a review by Jeffers of plaintiff's book Property Power consisting of his comments and opinion (A 134, 324).

On December 20, 1972, a printed reproduction of the review, which also contained certain "quotes" attributed to plaintiff by defendants other than Jeffers and the Westinghouse defendants, was published and distributed by defendant Robert Martin Corporation along with certain other material pertinent to the promotion of Tarrygreen (A 151, 154).

In October 1971, defendant Jeffers began to review books for Broadcasting as a part of his employment (A 132). The overall decision to broadcast book reviews was made by the management of station WINS (A 136). Before the review of Property Power, Jeffers had broadcast 60 book reviews over WINS as part of the station's news features (A 133). Jeffers was recognized at the station as a competent author and literary critic (A 136). Prior to the broadcast at issue Jeffers had written eight books (A 133).

Property Power was published by Doubleday in June 1972 (A 8). The book is subtitled, "How to Keep the Bulldozer, the Power Line, and the Highwaymen Away From Your Door" (A 315-316). Jeffers read the book in the fall of 1972 (A 133).

On December 15, 1972, Jeffers read a front page article in the December 16 early edition of the New York Times entitled "New England Resists Land Development Pressures" (A 133). Upon reading the article, Jeffers alone decided that a review of Property Power would be pertinent and timely (A 133). Jeffers prepared his review and recorded it on tape at station WINS on December 16, 1972 (A 133). The review ran for two minutes and six seconds and was broadcast on the following day at least four times (A 136).

Jeffers received a talent fee of $20 from his employer Broadcasting for the review (A 133). No other consideration was received by Jeffers nor did Broadcasting receive any consideration for the broadcast of the Property Power review (A 133,136). Defendant Yottes had nothing to do with the book review (A 136-137) as Yottes himself confirmed (A 133). The Westinghouse defendants and Jeffers had no dealings of any kind with defendant Yottes or any of the other defendants with respect to any of the matters alleged in the action (A 134, 137).

Jeffers has never met nor spoken with plaintiff personally (A 134); he had no knowledge of the defendants Robert Weinberg, Robert Martin Corporation, Martin Berger, Margaret Migliore Schneider or Gerald David Lloyd (A 134). Neither Jeffers nor the Westinghouse defendants had any interest in the Robert Martin development known as Tarrygreen (A 134, 137). No one at Electric participated in the broadcast of the Jeffers review, which is part of the daily operations of Broadcasting as the licensee (A 139).

Plaintiff cannot and did not contravert any of the foregoing facts in the District Court by the evidentiary facts required by the Federal Rules when met with defendants' well-grounded motion for summary judgment (A 325). Instead, as the District Court quite properly found, she submitted

conclusory and irrelevant affidavits violative of Rule 56(e) (A 327 n. 14) and a conclusory 9(g) statement violative of the Southern District General Rules (A 326 n. 15).

In the District Court and on this appeal plaintiff relies upon unsupported reckless charges, unfounded inferences and argument, fallacious conclusions drawn from irrelevant matters, and sheer conjecture purportedly showing a "meretricious" sinister plot to defame her, e.g., Property Power was six months old; its title was misrepresented; the New York Times' article was a "pretext" for the review; and Jeffers was not a "bona fide" reviewer because, among other things, he did not get free review copies of books. By use of such fallacious irrelevancies, plaintiff then proposes the reckless supposition that Jeffers may have taken "payola" to promote books (A 210). From this illusory premise plaintiff then postulates the quintessential surmise that Jeffers would take "payola" in this case (A 210). Following this irrelevant exercise in attenuation, plaintiff admitted that she had absolutely no facts to prove her hypothesis stating: "Whether Jeffers was paid for his fake 'book review' or whether he did it as a favor for Vottes, I do not and cannot know." (A 212-213).

In view of plaintiff's understandable failure to create a genuine issue of material fact, the District Court

was fully justified in granting summary judgment to Jeffers and the Westinghouse defendants. This is particularly so in view of the "chilling effect" necessarily resultant upon said defendants' First Amendment rights and said defendants' privilege of fair comment.

SUMMARY OF ARGUMENT

Plaintiff's speculative conclusions of conspiracy and her misleading Statement of the Issues seek to divert this Court from the real issues on this appeal. The Westinghouse defendants and Jeffers contend that the District Court's dismissal of the action should be affirmed as to them for any one of the following reasons: (1) As a matter of law, Jeffers' review of plaintiff's book as an expression of comment is not libelous of plaintiff; (2) As a matter of law, the publication is a critical review and fair comment on plaintiff's book; (3) As a matter of law, the review is constitutionally privileged. Plaintiff has not met and cannot meet her burden of showing evidentiary facts giving rise to a genuine issue of material fact as to whether Jeffers and the Westinghouse defendants were motivated by malice.

Further, the claim of the alleged conspiracy to violate certain sections of the Communications Act was properly dismissed as to Jeffers and the Westinghouse defendants and that judgment should be affirmed for either of the following

reasons: (1) Plaintiff concedes that she had no evidentiary facts to show the existence of a genuine issue of material fact as to the alleged "payola" conspiracy, and (2) in any event, no private right of action for the claim purported to be asserted herein exists under the Communications Act by expression or implication.

POINT I

JEFFERS' REVIEW IS NON-LIBELOUS OF PLAINTIFF

The matter in controversy with respect to Jeffers and the Westinghouse defendants concerns nothing more than the broadcast of a critic's review of plaintiff's book, Property Power. The District Court properly found that the review does not attack plaintiff personally and that her assertion to the contrary is groundless (A 313). In addition, the specific portions of the review alleged to be defamatory by plaintiff in her affidavit (A 202) were held not to be statements of fact; "[r]ather they can only be characterized as expressions of opinion" (A 314). In view of these findings, plaintiff's claim of defamation is non-existent, without regard to her specious claim of a malicious conspiracy against her.

It is a well-established principle in libel law that criticisms of the works of an artist or author are never libelous. Berg v. Printers' Ink Publishing Co., 54 F. Supp. 795 (S.D.N.Y. 1943); aff'd, 141 F.2d 1022 (2d Cir. 1944); Hamilton v. Eno, 81 N.Y. 116 (1880); Outcault v. New York Herald Co., 117 App. Div. 534, 102 N.Y.S. 685 (1st Dept. 1907). Even if such criticism implies some criticism of the artist or author, this does not make it actionable. Berg v. Printers' Ink Publishing Co., supra.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court reiterated this long standing principle by declaring that actionable defamation can lie only in false statements of fact, not opinion. The Court stated (418 U.S. at 339-40):

> "... Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

As a matter of both federal constitutional law and New York law, Jeffers' review is non-actionable.

Plaintiff's contention that the review attacks her personally is groundless. The background information concerning plaintiff in the review simply states that she is the writer of the book Property Power; that she is neither a city planner nor architect; that she lives in Redding, Connecticut and has been busy there, keeping her piece of New England clean and green (just as it says in the author's biography which appears in the book's jacket); and that she was born in Missouri. The remainder of the review, including the words "seeming hypocrisy", is comment dealing with the contents of the book and, thus, cannot be defamatory of plaintiff as a matter of law.

Plaintiff urges that the words "seeming hypocrisy" are defamatory of her. The words, as they appear in the review, clearly refer to the book's content, not to plaintiff as the District Court so noted (A 314 n.5). The relevant statement in the review reads:

> "What bothers me about Property Power is the seeming hypocrisy of it." (Emphasis Supplied)

Plaintiff's argument also misconstrues the applicable law. Even if reflection upon the author occurs by virtue of the publication of commentary critical of the author's work, this does not give rise to a claim for relief based upon defamation of the author himself. Berg v. Printers' Ink Publishing Co., Inc., supra; Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971) (see Point II infra). To adopt plaintiff's contentions would necessitate the curtailment of all literary criticism merely because such criticism may impart some criticism to its author.

Moreover, even if the alleged defamatory portions of the review are construed as fact and are further construed as directed at plaintiff personally, the review is still non-libelous of plaintiff.

The law of defamation is concerned with injuries to one's reputation. Plaintiff's own reaction - whatever it may be - has no bearing on the issue of whether or not a

publication is libelous. Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102-103, 186 N.E. 217, 218 (1933).

A basic test of whether or not a publication is libelous appears in O'Connell v. The Press Publishing Co., 214 N.Y. 352, 358, 108 N.E. 556, 557 (1915), where the Court said:

> "It (the publication) was not in and of itself libelous unless the language as a whole, considered in its ordinary meaning, naturally and proximately was so injurious to the plaintiff that the court will presume, without any proof, that his reputation or credit has been thereby impaired."

Thus for a statement to be libelous it must tend to expose the person to hatred, contempt, ridicule or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community. Tracy v. Newsday, Inc., 5 N.Y. 2d 134, 182 N.Y.S. 2d 1 (1959); Brown v. Du Frey, 1 N.Y. 2d 190, 151 N.Y.S. 2d 649 (1956); Nichols v. Item Publishers, Inc., 309 N.Y. 596, 132 N.E. 2d 860 (1956); Mencher v. Chesley, 297 N.Y. 94, 75 N.E. 2d 257 (1947).

Plaintiff contends without citation of authority that the question of whether or not the words "seeming hypocrisy" are libelous is one of fact for the jury. This ignores the settled law that the issue of libel or no libel is one of law not of fact. In Julian v. American Business Consultants, Inc., 2 N.Y. 2d 1, 155 N.Y.S. 2d 1, 14 (1956), the

Court stated (at p. 14):

> "It is for the court to decide whether a publication is capable of the meaning ascribed to it. The 'court shirks its duty if it creates an issue, when none exists'. Crane v. New York World Tel. Corp., 308 N.Y. 470, 479-480."

On p. 17, the Court stated:

> "We declared in Moore v. Francis (121 N.Y. 199, 202-203): 'It is the settled law of this state that in a civil action for libel, where the publication is admitted and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law which the court must decide. (Snyder v. Andrews, 6 Barb, 43; Matthews v. Beach, 5 Sandf. 256; Hunt v. Bennett, 19 N.Y. 173; Lewis v. Chapman, 16 id. 369; Kingsburg v. Bradstreet Co., 116 id. 211.)'"

As a matter of law, the words "seeming hypocrisy" do not meet the established criteria for libel and hence are not defamatory. In the context of Jeffers' book review, the words are comment upon plaintiff's book (as amounting to a handbook which would keep others out while keeping non-urban communities clean and green) and cannot give rise to claim for relief. Indeed, even if these words relate to plaintiff personally, and they do not, the words are certainly no more than "rhetorical hyperbole" or a "vigorous epithet" and hence are non-actionable. See Greenbelt Cooperative Pub. Assn. v. Bresler, 398 U.S. 6, 14 (1970); Time, Inc. v. Johnston, 448 F. 2d 378, 384 (4th Cir. 1971); Cohen v. New York Herald Tribune, Inc., 63 Misc. 2d 87, 102, 310 N.Y.S. 2d 709, 724 (Sup. Ct., Kings Co., 1970).

The authorities cited by plaintiff all concern several serious accusations that were made upon a plaintiff's reputation and none involved criticisms of an author's work. Thus, in Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920), a judge, in addition to being described as hypocritical, was charged as being ignorant, brutal, corrupt, [illegible]ed by his fellows, bestial of countenance, unjust, dominated by political influences and grossly unfit. In McKee v. Robert, 197 App. Div. 842, 189 N.Y.S. 502 (3d Dept. 1921) charges of corruption, immorality, filth and degeneracy were made. In Levey v. Brooklyn Union Pub. Co., 65 Misc. 373, 121 N.Y.S. 643 (Sup. Ct. N.Y. Co. 1909), charges of dishonesty and double dealing were made. To the same effect is Thorley v. Lord Kerry, 4 Taunt. 355 (1812) where the plaintiff was referred to as one who with the grossest impurity "deals out his malice, uncharitableness, and falsehoods."

In summary, as the District Court found (A 313-314), the alleged defamation is opinion and deals with plaintiff's book, not plaintiff. Hence, there can be no defamation of plaintiff. Moreover, even if the review attacks plaintiff personally, which it clearly does not, the review is nonetheless non-libelous as a matter of law. Plaintiff's speculative charge of a bizarre conspiracy among the defendants has no bearing on this question. No amount of speculation can make non-defamatory comment actionable. The judgment below should be affirmed on the ground that the review is non-defamatory of plaintiff.

POINT II

THE DISTRICT COURT CORRECTLY HELD AS A MATTER OF LAW THAT THE REVIEW WAS FAIR COMMENT

The District Court held that Jeffers' review is fair comment upon plaintiff's book (A 324). Fair comment constitutes a complete defense to a charge of a libelous publication. Julian v. American Business Consultants, Inc., 2 N.Y.2d 1, 7, 155 N.Y.S.2d 1, 7 (1956).

When plaintiff wrote her book, she naturally attracted and invited public attention. Her book became subject to criticism even if such criticism were hostile to the point of ridicule and beyond.

The District Court, quoting from an early English case, Carr v. Hood, 1 Campb. 354, 357 (1808), noted that fair comment was a long-established principle (A 312). This well settled principle was applied in Berg v. Printers' Ink Publishing Co., Inc., 54 F. Supp. 795 (S.D.N.Y. 1943), aff'd on the opinion below, 141 F.2d 1022 (2d Cir. 1944), where the Court dismissed a complaint in alleged libel based upon an article critical of two papers written by plaintiff. The District Court there stated the propositions of law directly applicable to this case (54 F. Supp. at 796-97):

> "When the plaintiff thus submitted his professional work to the public and thereby appealed for its support and approval, he was bound to expect, with equal equanimity, praise or blame directed at the work itself. Fair and legitimate criticism is always permitted upon any work to which the attention of the public has been invited. It would not be a libel upon the plaintiff to say that the product of his pen was not good....
>
> The criticism need not express an opinion with which any person of reasonable intelligence and judgment could possibly agree.... Published work is of public interest and fair criticism or comment on such matters is not actionable in the absence of bad faith or a bad motive. Such criticism usually implies some criticism of the author; and though his private character is no more subject to attack than another's, the qualities which he has shown by what he had published are open to such analysis and comment as an honest and intelligent man might make." Restatement, §606(e); §609(c); Potts v. Dies, 77 U.S. App. D.C. 92, 132 F.2d 734; Sullivan v. Meyer, 67 App. D.C. 228, 91 F.2d 301-302.

Relying on both Berg and Buckley v. Vidal, 327 F. Supp. 1051 (S.D.N.Y. 1971) (a summary judgment decision), the District Court recognized that the latitude allowed the critic in this area is quite large (A 321). Moreover, stylistic techniques utilized by a reviewer, such as sarcasm, exaggeration, irony or wit do not push beyond the limit of fair comment as a matter of law. Briarcliff Lodge Hotel Inc. v. Citizen-Sentinel Publishers, Inc., 260 N.Y. 106, 183 N.E. 193 (1932). In the publication at issue, as

found by the District Court there are no facts in the review claimed to be defamatory, only expressions of opinion.*

As a Matter of Law the Review is Fair and is Based Upon Plaintiff's Book

The issue of law before the District Court was not the merits of the Jeffers' comments but whether the comments are "so obviously without basis in fact, as to be adjudged unfair or dishonest." Buckley v. Vidal, supra, 327 F. Supp. at 1054; Berg v. Printers' Ink Publishing Co., Inc., supra. In this case as in Buckley, the "basis in fact" is the content of the book.

In measuring the challenged portions of the review against the content of the book, the District Court concluded (A 322-324):

> "Property Power describes the various tools which can be successfully utilized to keep land developers, utilities, and highways 'away from your door'; the door generally being the rural and suburban areas which ring the cities. Essentially it deals with means of preventing or curbing unrestrained growth and development to the detriment of the homeowner, property owner, and community. The evils to be battled include unregulated growth in housing, population and industry. A necessary result of the implementation of land trusts, land use

*The Court stated (A 314): "The requirement that the facts be truly stated is not applicable to the disputed review, since those portions alleged to be defamatory are not statements of fact. Rather they can only be characterized as expressions of opinion." (footnotes omitted)

> controls and open space programs is the unavailability of land for newcomers; in this sense the book does advocate 'keeping others out,' and specific passages support Jeffers' comments and opinions, though his opinions need not be any with 'which any person of reasonable intelligence and judgment could possibly agree.' Berg, supra, 54 F. Supp. at 797. As a matter of law, I find that the review is a reasonable comment on the content of the book, and is fair." (footnotes omitted)

Thus, the District Court found more than is necessary for the complete fair comment defense clearly established here by the Westinghouse defendants and Jeffers in its proper, though unrequired, conclusion that Jeffers' comments were quite reasonably warranted by the content of the book. In so doing, the District Court cited several passages among others in Property Power which provide a clear basis for the reviewer's comments (A 322-324). These are not isolated passages taken out of context as plaintiff contends but are simply representative of the overall theme of the book as expressed by the reviewer. As found below, the book is in fact replete with various methods of action which would have the effect of restraining development in the suburbs. Examples of this resistance include zoning, lawsuits, petitions, land trusts, land banks, land use control and open space programs all to the end of making land unavailable for development and for use by newcomers. In any case, the fact that the book may discuss environmental

topics does not make the comment here in issue actionable.* The question before the Court is whether the comments are so obviously without a basis in the book as to be adjudged unfair or dishonest. Further, this question is one of law and not of fact. Buckley v. Vidal, supra. Under this applicable standard, there can be no question that the content in the book more than justified the finding by the District Court that the Westinghouse defendants and Jeffers were entitled to summary judgment based upon the fair comment defense.

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*Indeed, it is plaintiff here who, by footnote reference at p. 41 of her brief, makes use of the selected phrase in a futile and most certainly immaterial effort to "illustrate" that the "scope" of Property Power is such that Jeffers' commentary is legally actionable because the book includes what could be characterized as environmental issues. There, plaintiff engages in a paraphrased recitation of isolated wording from 21 of the some 282 pages of text found in the book. This irrelevant exercise, as might be expected, fails to note that the very paraphrased wording is to be found in such chapters and under such sub-headings as: "Backyard Battles" (p. 9); "You can Stop Progress" (p. 17); "People Against Progress" (p. 38); "Buying Open Land" (p. 120); "Land Trusts Can Help" (p. 125); "Land-Save Programs" (p. 135); "Dramatize the Effects" (p. 174); "Touching the Power Base" (p. 176); "Building Local Safeguards" (p. 181); "Economic Growth Zero?" (p. 255) and "Staying Power" (p. 269).

In all events, plaintiff does not and cannot refute the presence in Property Power of the passages quoted by the District Court (A 322-24, n. 11) as well as other statements therein which amply and thoroughly support the comments of defendant Jeffers as to the effects of plaintiff's stated position.

Moreover, even if plaintiff could establish that the comments of defendant Jeffers were unreasonable, that fact, not present here to be sure, would be utterly immaterial to the issue of whether the comments were "fair" as a legal matter within the meaning of the defense of fair comment.

The cases cited by plaintiff as support for the proposition that the review "misrepresented" the contents of the book are clearly inapposite and were so found by the District Court (A 315-317). These cases, Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 167 N.E. 432 (1929); d'Altomonte v. New York Herald Co., 154 App. Div. 453, 139 N.Y.S. 200 (1st Dep't 1913) mod. 208 N.Y. 596, 102 N.E. 1101 (1913); Clevenger v. Baker Voorhis & Co., 8 N.Y.2d 187, 203 N.Y.S.2d 812 (1960); Carroll v. Paramount Pictures, Inc., 3 F.R.D. 95 (S.D.N.Y. 1942) do not concern critical comment or opinion dealing with an author's published work. In these cases the courts found that a claim of defamation may lie where a publication is falsely stated to have been authored by the plaintiff and where the content of the publication holds plaintiff up to ridicule and contempt or injures him in his professional reputation. These elements are totally absent from this case - there is no dispute that plaintiff is the author of Property Power. Moreover, the claim that the full title of the book was intentionally omitted was found "specious" by the District Court as a glance at the book, its hard cover, jacket and title page clearly shows (A 315; 315-16 n. 7).

Plaintiff's reliance upon Triggs v. Sun Printing and Publishing Ass'n, 179 N.Y. 144, 71 N.E. 739 (1904) is

equally misplaced. In Triggs, the Court of Appeals emphasized that the series of articles complained of there were not comment upon the plaintiff's works, rather they concerned his private life and attacked his personal character, using words per se libelous portraying him as ridiculous, illiterate, uncultivated, coarse and vulgar.

Similarly, neither Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930) nor Sullivan v. Daily Mirror, Inc., 232 App. Div. 507, 250 N.Y.S. 420 (1st Dep't 1931) concern fair and legitimate criticism of an author's works. Furthermore, in both cases the Court was dealing solely with the sufficiency of the pleadings. Indeed, Hoeppner v. Dunkirk Printing Co., supra, reiterated the principle of fair comment discussed above, i.e., that fair and honest criticism is not libelous "however strong the terms of censure may be". (254 N.Y. at 99, 172 N.E. at 140).

Plaintiff Has Failed to Raise a Genuine Issue of Material Fact as to Malice

In the District Court proceeding, plaintiff failed to sustain her burden of producing specific facts admissible in evidence to create a genuine issue of material fact as to malice. The District Court rightfully concluded that plaintiff had shown only unsupported speculation and surmise stating (A 325-326):

> "Contrary to plaintiff's allegation of malice, a careful reading of the affidavits, depositions and exhibits filed here show that plaintiff has not raised a disputed genuine issue of material fact as to malice. In opposing a motion for summary judgment, plaintiff has the burden of producing specific facts, admissible in evidence, which show that there is a genuine issue for trial.
>
> "Though complete and exhaustive depositions have been taken, plaintiff has not satisfied that burden. Instead, plaintiff has come forward with only unsupported speculation, opinion and surmise--none of which is sufficient to defeat a well grounded motion for summary judgment. Daily Press, Inc. v. United Press International, 412 F.2d 126, 134 (6th Cir.), cert. denied, 396 U.S. 990 (1969); Wilson Jones Co. v. Gilbert & Bennett Manufacturing Co., 332 F.2d 216, 219 (2d Cir. 1964); Meeropol v. Nizer, 381 F. Supp. 29, 32, 35 (S.D.N.Y. 1974); Konigsberg v. Time, Inc., 312 F. Supp. 848, 853-54 (S.D.N.Y. 1970); Flintkote Co. v. United States, 47 F.R.D. 322, 324 (S.D.N.Y. 1969), cert. denied, 402 U.S. 944 (1971)." (footnote omitted)

Clearly, plaintiff has presented no genuine issues of material fact on the issue of fair comment vel non.*

The defense of fair comment has been the basis for summary disposition in several recent cases where plaintiff had failed to establish an allegation of malice by sufficient evidentiary facts. E.g., Miller v. News Syndicate Co., Inc.,

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*This is a question of law for the Court, and plaintiff can defeat defendants' motion for summary judgment on this point only where evidentiary facts raising a genuine issue as to malice are presented. Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56, 61, 63, 194 N.Y.S.2d 509, 513, 515 (1959).

445 F.2d 356 (2d Cir. 1971); Buckley v. Vidal, supra; Cole Fisher Rogow, Inc. v. Carl Ally, Inc., 25 N.Y.2d 943, 305 N.Y.S.2d 154 (1969). Were the rule otherwise, "summary judgment would cease to exist and courts would have no way of avoiding long and expensive litigation that promises to produce nothing." Buckley v. Vidal, supra, 327 F. Supp. at 1055.*

As a matter of law, the review of plaintiff's book by defendant Jeffers was fair comment. The judgment below should be affirmed on this separate and distinct ground.

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*A full discussion of plaintiff's failure to meet her burden on the motion below and the appropriateness and necessity for summary judgment appears in Point IV infra.

POINT III

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED ON CONSTITUTIONAL GROUNDS

Entirely apart from the principles calling for dismissal under Points I and II, supra, the District Court properly held that constitutional considerations, which place the burden upon plaintiff to show "actual malice" by clear and convincing evidence, mandate the dismissal of plaintiff's defamation claims (A 331). Thus, since plaintiff could not and did not present evidence showing the existence of any genuine issue of fact as to whether such malice actually existed, summary judgment was properly granted to the Westinghouse defendants and Jeffers (A 332).

The Review is Constitutionally Privileged as a Matter of Federal Law

It is apparent from plaintiff's arguments and her statement of issues, predicated upon her assertion and assumption that a genuine issue of fact exists as to malice, that she concedes her burdens attendant to the constitutional privilege herein. Nevertheless, we set forth a brief statement of the constitutional privilege as it applies to the facts of this case.

The constitutional privilege doctrine was first enunciated by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964) which held that under the First

Amendment, a public official charging libel must prove that the article concerning him was published with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Three years after the decision in New York Times, the Supreme Court extended the constitutional privilege to defamatory statements of "public figures". Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Later, in Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971), the Court held that the constitutional privilege should be extended to defamatory falsehoods relating to private persons if their publication concerned matters of general or public interest.

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court reaffirmed its holding in the Times and Curtis decisions that individuals who are public figures or public officials may recover for injury to reputation only on clear and convincing proof of actual malice. With respect to private individuals, the Court left it to the States, so long as they do not impose liability without fault, to define for themselves the appropriate standard of liability for a publisher of a defamatory statement of fact which "makes substantial danger to reputation apparent", 418 U.S. at 347-48. Furthermore, such individuals cannot recover presumed or punitive damages, at least absent the showing of malice required by the New York Times decision.

As a matter of federal constitutional law as found by the District Court (A 331), plaintiff is a public figure within the meaning of Gertz and the constitutional privilege is applicable. In Gertz, the Supreme Court noted that the designation of an individual as a "public figure" may arise because (418 U.S. at 351):

> ". . . In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."

Applying the Supreme Court's test, it is indisputable that plaintiff, by virtue of her authorship of the book Property Power and its submission to the public for critical comment by reviewers and others, has voluntarily injected herself into the public issues which she discussed in her book. It follows that plaintiff thus became a public figure at least with respect to further discussion of such issues and certainly of the book itself. Indeed, plaintiff did not deny below that she was a public figure by conceding that she has openly debated the work, has appeared at public forums where she spoke concerning matters discussed in the book, has written articles and claims expertise on the subject (A 198-199, 206, 230-232; App. Br. p. 13). Without question, plaintiff has attempted to shape debate on the matters discussed in her

book. She may not now be heard to complain that no constitutional protection attends comment upon those efforts in which she has voluntarily engaged.

A similar set of circumstances was presented in Dacey v. Florida Bar, Inc., 427 F. 2d 1292 (5th Cir. 1970). In that case (decided prior to Rosenbloom and Gertz), plaintiff had written the book, How To Avoid Probate, and a writer in the Florida Bar Journal reviewed the book critically and reported that in Connecticut plaintiff had been convicted for unauthorized practice of law. The Court held that plaintiff was a public figure as follows (427 F. 2d at 1295):

> "It is clear that Dacey's book, his many radio, television, and personal appearances, and the magazine and newspaper articles constituted 'purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy' which 'commanded a substantial amount of independent public interest at the time of the publications.' Butts, 388 U.S. at 154-155, 87 S. Ct. at 1991. Thus we hold that Dacey was a public figure."

In view of the subsequent clarification and expansion of the meaning of a public figure as outlined in Gertz, in language so strikingly similar to that of Dacey, there can be no question that plaintiff is a public figure. By writing Property Power, she thrust herself into the vortex of debate on public

issues and invited public attention and comment. She is, therefore, clearly a public figure in this context.

In view of the foregoing, plaintiff's contention that no authority holds that an author is a public figure is baseless (App. Br. 52-53). In addition, the "public controversy" in which plaintiff voluntarily involved herself is not Jeffers' review of the book as plaintiff implies in her brief nor even Property Power itself, but rather is the subject matters discussed in her book.*

The Review is Constitutionally Privileged as a Matter of New York Law

Regardless of whether or not plaintiff is a public figure, the review is nonetheless constitutionally

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* Broadcasting's response to a question in the course of a deposition that the review itself was not a "controversial issue of public importance" was addressed solely to whether or not the review was included within the meaning of a particular F.C.C. regulation (47 CFR §73.123). The quoted phrase is a term having particular legal consequences for licensees under the F.C.C. regulatory framework and has no bearing on plaintiff's status as a public figure under Gertz. Thus, plaintiff's assertion in her brief (p. 52) with reference to this deposition statement is characteristically devoid of any significance as to the merits of the motion for summary judgment made by the Westinghouse defendants and Jeffers. Furthermore, it has long been clear that these regulations exist for the purpose of defining standards protecting the general public good and are to be administered by that federal agency. They serve as no basis for a private defamation action such as that brought by plaintiff here. (See Point V, infra.)

privileged under New York law. Subsequent to Gertz, a number of decisions in New York State have held that with respect to private individuals the appropriate standard of liability is the "public interest" or Rosenbloom test. See Sarafets Inc. v. Gannett Co., Inc., 80 Misc. 2d 109, 361, N.Y.S. 2d 276 (Sup. Ct. Broome Co., 1974), aff'd,----App. Div. 2d ----, ---- N.Y.S. 2d--(3d Dep't 1975); Commercial Programming Unlimited v. Columbia Broadcasting Systems, Inc., 81 Misc. 2d 678, 367 N.Y.S. 2d 986 (Sup. Ct. N.Y. Co., 1975); Med-Den Enterprises, Inc. v. Forbes, Inc., (Sup. Ct., N.Y. Co.) N.Y.L.J. (4/14/75) p. 2, col. 6; Jet Asphalt Corp. v. N. Y. Post Corp., (Sup. Ct., N.Y. Co., 1975) N.Y.L.J. (6/5/75), p. 16, col. 7. It cannot be disputed that Property Power deals with a subject of public interest under the Rosenbloom test. Hence, the review is constitutionally privileged under New York law.

In sum, since the constitutional privilege applies, plaintiff is required to show affirmatively facts giving rise to an issue of fact on whether malice in the Times sense actually existed. United Medical Laboratories v. Columbia Broadcasting System, Inc., 404 F. 2d 706, 712 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969): Thompson v. Evening Star Newspaper Co., 394 F. 2d 774, 776 (D. C. Cir. 1968), cert. denied, 393 U.S. 884 (1968). The irrelevant, speculative and

conclusory allegations set forth in plaintiff's affidavits are plainly not the evidentiary facts required to defeat the granting of summary judgment based upon constitutional privilege. Konigsberg v. Time, Inc., 312 F. Supp. 848, 853 (S.D.N.Y. 1970); Trails West, Inc. v. Wolff, 32 N.Y. 2d 207, 221, 344 N.Y.S. 2d 863, 874 (1973). Under the circumstances, the District Court properly dismissed the action as to Jeffers and the Westinghouse defendants on this separate and independent ground.

POINT IV

PLAINTIFF'S FAILURE TO SHOW SUFFICIENT EVIDENTIARY FACTS GIVING RISE TO A GENUINE ISSUE OF MATERIAL FACT NECESSITATED THE SUMMARY JUDGMENT GRANTED TO THE WESTINGHOUSE DEFENDANTS AND JEFFERS.

Pursuant to Rule 56(e), plaintiff has the burden to set forth specific admissible evidentiary facts showing that there is a genuine issue of material fact. As the District Court found, plaintiff clearly failed to meet her burden (A 325). Moreover, in this defamation action, summary judgment is required to avoid the "chilling effect" upon defendants' First Amendment rights particularly where, as here, no admissible evidentiary showing as to the issue of actual malice has been or can be made by plaintiff.

The uncontradicted simple facts of this case show that Jeffers alone selected Property Power for review and prepared the review for broadcast. He received no unlawful consideration or compensation from any one. Indeed, Jeffers had no dealings of any kind with the plaintiff, the Robert Martin Corporation, its officers or employees, or its project Tarrygreen. Defendant Yottes was not employed by Broadcasting at any time relevant to the claims herein and he had nothing to do with the Jeffers review. (See p. 9, supra.)

Plaintiff Failed to Meet Her Burden

The foregoing facts were not contraverted by

plaintiff's affidavits opposing defendants' motion for summary judgment; the fanciful "payola" conspiracy charge central to plaintiff's claims has never been supported by a single evidentiary fact. As found by the District Court, plaintiff came forward only with unsupported speculation, opinion and surmise - "none of which is sufficient to defeat a well grounded motion for summary judgment" (A 325).

In her affidavit, plaintiff surmised without any factual support that if Jeffers would take "payola" to promote books of publishers, then he would take "payola" in her case (A 219). In the face of this irresponsible and outrageous charge of a criminal violation of federal law, she then admitted that she had no facts showing such a violation (A 212-213). Thus, this concededly unfounded assertion was properly rejected by the District Court as "egregious" (A 326).

Similarly, plaintiff's contention that Jeffers was not a "bona fide reviewer" based upon a bizarre and distorted analysis of other improper affidavits submitted on her behalf was also found "egregious" by the District Court (A 326). The District Court listed only a few of the more flagrant examples of plaintiff's reckless and

unsubstantiated charges in its opinion.* These same speculative and conclusory claims drawn from irrelevant matters are substantially reiterated by plaintiff in her brief (App. Br. 28-36). For example, plaintiff surmises that because Yottes had worked at WINS prior to the time plaintiff had ever involved herself in the Tarrygreen project, he was therefore a "double agent" who must have conspired with Jeffers and the Westinghouse defendants. It is incredible that any conclusion of a conspiracy could rest on such conjecture.** Plaintiff's arguments should also be rejected by this Court for the reasons stated by the District Court.

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*The Court rejected as egregious the following charges: "that Jeffers is not a bona fide book reviewer because he buys his books rather than receiving them free from publishers (A 208); that Jeffers was promoting books for publishers, rather than being a legitimate reviewer, because only eight of sixty-five books reviewed were on best-seller lists and because he utilized taped material which 'had to have come from the publishers' (A 208-210); that Jeffers did not review books on their merits because only one other book, in addition to Property Power, was published by Doubleday, while three other reviews in a one-month period concerned books of a smaller publisher (A 211); that if Jeffers would take 'payola' to promote books, he would take 'payola' to hurt plaintiff (A 210); and that the Jeffers' review was initiated by one of the Robert Martin defendants, though whether 'Jeffers was paid for his fake "book review" or whether he did it as a favor for Yottes, I do not and cannot know.' (A 212-13)."

**In an analagous circumstance, in Beidler & Bookmyer v. Universal Ins. Co., 134 F.2d 828 (2d Cir. 1943), plaintiff tried to show that defendant had induced a breach of contract with the insured by showing that the defendant and the insured were close personal friends. This Court held that this was not a genuine issue of material fact and affirmed an award of summary judgment to the defendant.

The Court found the remaining affidavits submitted by plaintiff similarly improper and irrelevant stating (A 327 n. 14):

> "Other affidavits submitted in opposition to the motion are similarly infirm. The Applebaum affidavit is based on hearsay and opinion, and is conclusory and argumentative. The Harris and Dolph affidavits, purporting to show the general practice in the publishing field of distributing new books free to reviewers, is irrelevant. The Kanefsky and Winnick affidavits, prepared by paralegal assistants in plaintiff's counsel's law firm contain transcripts of more than sixty book reviews broadcast by Jeffers, publication dates of the books reviewed, and the ostensible impetus for each review; they are asserted to show both a purported untimeliness of the Property Power review and the general absence of personal 'attacks' on the author; the assertion that the review was untimely is contradicted by the specific impetus of the review--the Time's [sic] article--and by an artificial determination that only books reviewed within six months of their publishing date are 'new'."

The burden cast upon plaintiff under Rule 56(e) is succinctly stated in 6 Moore, Federal Practice ¶56.13[3], pp. 2346-47 as follows:

> "To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the party opposing the motion must present facts in proper form --conclusions of law will not suffice and the opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions." (footnotes omitted)

Plaintiff simply ignored this burden and essentially rested on the conclusory allegations of her pleadings. Plaintiff's 9(g) statement was replete with these conclusory allegations and thus found violative of Rule 56(e) (A 328 n. 15). The conclusory allegations set forth throughout plaintiff's affidavits cannot be considered and cannot defeat defendants' motions. Daily Press, Inc. v. United Press International, 412 F.2d 126 (6th Cir.), cert. denied, 396 U.S. 990 (1969); Ashwell & Company v. Trans-America Insurance Company, 407 F.2d 762 (7th Cir. 1969); Wilson Jones Co. v. Gilbert & Bennett Mfg. Co., 332 F.2d 216 (2d Cir. 1964); Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966).

Plaintiff's improper speculative conclusions of an imagined conspiracy cannot raise any factual issue of credibility nor can any factual inference be drawn therefrom. On a motion for summary judgment, it is only inferences of fact that must be viewed favorably to the opposing party and, furthermore, such inferences must be reasonable.*

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*These basic principles are not at odds with this Court's recent pronouncement in Heyman v. Commerce and Industry Insurance Co., Docket No. 75-7230 (October 24, 1975) that where two reasonable inferences or interpretations can be drawn from ambiguous contractual language, summary judgment is inappropriate.

United States v. Diebold, Inc., 369 U.S. 654 (1962); Empire Electronics Co., Inc. v. United States, 311 F.2d 175 (2d Cir. 1962); Ayers v. Pastime Amusement Co., 283 F. Supp. 773 (D.C.S.C. 1968). Where speculation and conjecture are presented instead of facts, no issue of material fact can exist. Atlantic States Construction Company v. Robert E. Lee & Co., Inc., 406 F.2d 827, 829 (4th Cir. 1969) ("It is not the office of Rule 56 to preserve purely speculative issues of fact for trial"); United States v. Mt. Vernon Milling Company, 345 F.2d 404, 407 (7th Cir. 1965) ("Intangible speculation does not raise an issue of material fact"); Banco De Espana v. Federal Reserve Bank, 28 F. Supp. 958, 973 (S.D.N.Y. 1939), aff'd, 114 F.2d 438 (2d Cir. 1940)("This court will not base its decision on these motions on suspicions, but on facts").

Plaintiff's burden is not lessened merely because plaintiff claims that defendants covertly conspired among themselves. In Applegate v. Top Associates, Inc., 425 F.2d 92 (2d Cir. 1970), Judge Kaufman discussed Rule 56(e) and its application to a conspiracy claim as follows (425 F.2d at 96):

> "... This requirement [of Rule 56(e)] is applicable even to cases in which the plaintiff is attempting to unveil a shadowy and elusive conspiracy, see First National Bank v. Cities Service Co., 391 U.S. 253, 289-290, 88 S.Ct. 1575, 20 L.Ed. 2d 569 (1968) and Applegate has failed to meet it."

Similarly, Judge Weinfeld in Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954), aff'd, 220 F.2d 758 (2d Cir. 1955), cert. denied, 350 U.S. 867 (1955) in examining the burden cast upon plaintiff to come forward with evidence showing a conspiracy under the Civil Rights Act stated (125 F. Supp. at 389):

> "... Fully recognizing that conspiracies are rarely proved by direct evidence, nonetheless some evidence, however slight, must be offered of a fact from which a reasonably-minded person can draw an inference of the alleged conspiracy. Here not a scintilla of admissible proof has been submitted by plaintiff to controvert the defendants' affidavits." (footnote omitted)

The foregoing principles are particularly applicable where plaintiff has undertaken extensive and burdensome discovery. See Modern Home Institute Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102 (2d Cir. 1975); Trails West, Inc. v. Wolff, 32 N.Y.2d 207, 344 N.Y.S.2d 863 (1973). Plaintiff's discovery in this case is both excessive and oppressive.* Directly applicable here is the recent statement of this Court in Modern Home Institute, Inc., supra, 513 F.2d at 110:

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*This discovery, far exceeding 1,000 pages, includes depositions of numerous witnesses and voluminous document production, including tape recordings of some 60 book reviews of Jeffers (other than Property Power) broadcast over WINS over a period of more than a year, all of which have nothing to do with the review at issue.

> "Under these circumstances, unless plaintiffs have thus far turned up evidence from the defendants or elsewhere supporting their conspiracy theory we do not see how, in the face of defendants'uncontradicted evidence negating it, trial would give them any greater opportunity to elicit from defendants and their employees evidence tending to prove it. [citations omitted] If the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented. See First National Bank v. Cities Service Co., supra; Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952). Even if we were to disregard the denials as incredible, plaintiff would still be required to come forward with evidence which, viewed most favorably to them, would permit an inference of conspiracy. Absent such evidence, there is no issue for trial. 'Summary judgment cannot be defeated by the vague hope that something may turn up at trial,' Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969)."

Thus, affirmance of the award of summary judgment is particularly appropriate where, as here, plaintiff has had more than ample opportunity but has utterly failed to raise any genuine issue of material fact.

Plaintiff's Authorities are Irrelevant

Examination of the several authorities cited by plaintiff clearly demonstrate their inapposite nature. In Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944), the Supreme Court simply held that summary disposition of

a damage issue which involved the testimony of an expert witness as to the value of a natural gas lease was inappropriate since such opinion evidence was not entitled to conclusive force. Similarly, plaintiff's reliance on two cases involving complex antitrust issues, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) and White Motor Co. v. United States, 372 U.S. 253 (1963) is equally misplaced. Initially, it should be noted that this is not a complicated antitrust suit but a simple libel suit based on a book review; if the matters at issue appear lengthy or complex, it is only because plaintiff has injected innumerable irrelevancies into this case in a hopeless attempt to raise an issue of fact where none exists. More importantly, in Poller, plaintiff presented specific evidence, i.e., CBS's purchase of a competing television station and cancellation of another station's network affiliation in Milwaukee in addition to other proof which could create a genuine issue of material fact as to a violation of the antitrust laws. In White Motor Co., price fixing arrangements and franchise agreements between a manufacturer and distributors or dealers which provided for territorial and other restrictions constituted the evidentiary basis for the

claims alleged.*

In any event, even if this case were analogous to an antitrust action, plaintiff is still obligated by Rule 56(e) to offer evidence supporting her conclusion of a conspiracy. First National Bank v. Cities Service Co., 391 U.S. 253 (1968); Modern Home Institute, Inc. v. Hartford Accident & Indemnity Company, supra; Scranton Construction Co., Inc. v. Litton Industries Leasing Corp., 494 F.2d 778 (5th Cir. 1974), cert. denied, 419 U.S. 1105 (1975); Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Dahl, Inc. v. Roy Cooper Co., Inc., 448 F.2d 17 (9th Cir. 1971); Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970); Daily Press, Inc. v. United Press Int'l, supra; McGuire v. Columbia Broadcasting System, Inc., 399 F.2d 902 (9th Cir. 1968). Plaintiff has clearly not met this obligation.

Plaintiff's reliance on Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)(App. Br. 56), a civil rights

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*In White Motor Co., 372 U.S. 253 (1963), the Court also recognized that it knew too little concerning the impact of the alleged violation (vertical territorial restrictions) to permit a summary judgment. In addition, that Court noted that the motion below was decided prior to the amendment to Rule 56(e) which makes it incumbent upon a party opposing a summary judgment motion to submit competent affidavits setting forth specific facts showing the existence of a genuine issue for trial.

case under 42 U.S.C. §1983, misconstrues the holding of that case and the relationship between Rules 56(c) and (e). In Adickes, movants did not comply with Rule 56(c) in initially showing that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. Therefore, petitioner, unlike plaintiff herein, had no duty to comply with Rule 56(e). The Court stated (398 U.S. at p. 60):

> "... Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was not required [by Rule 56(e)] to come forward with suitable opposing affidavits."

Since Jeffers and the Westinghouse defendants have clearly met their initial burden under Rule 56(c), plaintiff was obligated but failed to come forward with competent affidavits in opposition.

Certain other cases cited by plaintiff are non-summary judgment - non-defamation cases which also have no relevance to the issues of this case and the burden plaintiff has failed to meet herein. Thus, in Keviczky v. Lorber, 290 N.Y. 297, 49 N.E.2d 146 (1943), the Court affirmed a jury verdict for plaintiff and set forth the full evidentiary basis consisting of various meetings and other acts of the defendants which showed that

plaintiff was prevented from earning a commission and was defrauded by defendants' acts. In Perkins v. Standard Oil Co., 395 U.S. 642 (1969) there was "sufficient evidence" in the record of a particular distribution chain between producer and retailer to support the inference that petitioner was injured by defendants' price discrimination. In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Court found "sufficient evidence" for a jury to infer a causal connection between respondents' antitrust violations and petitioner's injury by examining the specific acts of respondents charged to have been part of a plan to monopolize the vanadium market. In Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1944), "probative facts" as opposed to "mere speculation", namely an engineer's failure to give a required warning signal, were shown such that a jury might find proximate cause and negligence. Plaintiff has not shown such sufficient or probative evidence here in support of her fanciful claim of a conspiracy.

First Amendment Considerations Necessitate Affirmance of the Judgment Below

Since the rule of the Times case, summary judgment has been liberally utilized as an appropriate means to give First Amendment freedoms "breathing room" and to

avoid the "chilling effect" of protracted and expensive litigation. See, e.g., Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir.), cert. denied, 395 U.S. 922 (1969); Washington Post Company v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967); Meeropol v. Nizer, 381 F. Supp. 29 (S.D.N.Y. 1974); Buckley v. Vidal, supra, 327 F. Supp. at 1054; Konigsberg v. Time, Inc., supra, 312 F. Supp. at 852. In Washington Post Company v. Keogh, supra, Judge Wright discussed the importance of summary judgment in the First Amendment area as follows (365 F.2d at 968):

> "... Summary judgment serves important functions which would be left undone if the courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. Asbill & Snell, Summary Judgment Under the Federal Rules - When an Issue of Fact is Presented, 51 Mich. L. Rev. 1143, 1144 (1953).
>
> In the First Amendment area, summary procedures are even more essential. For the stake here if harassment succeeds, is free debate."

The function of summary judgment and the role of the Court with respect to the constitutional privilege was well stated in Cerrito v. Time, Inc., 302 F. Supp. 1971 (N.D. Cal. 1969), aff'd, 449 F.2d 306 (9th Cir. 1971) as follows (302 F. Supp. at 1075-76):

> "Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this. Plaintiff has been purposely given the heavy burden of proving actual malice. Cepeda v. Cowles Magazines and Broadcasting, Inc., (9th Cir. 1968), 392 F.2d 417. In order to prove actual malice, plaintiff must make an affirmative showing of facts from which defendant's probable knowledge of falsity may be constitutionally sustained (Thompson v. Evening Star Newspaper Company, 129 U.S. App. D.C. 299, 394 F.2d 774 [1968]; the mere hope of questioning the credibility of the defendant's witnesses is not sufficient to resist summary judgment (Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 974 [D. Minn. 1967]). When it has been established, as it has been in this case, that he cannot meet it, the First Amendment makes it incumbent upon the Court to grant defendant's motion for summary judgment ...."

Plaintiff ignores the general rule of the federal courts to grant summary judgment in libel actions where First Amendment rights are at stake and no factual showing with respect to the issue of actual malice is made. See, e.g., Perry v. Columbia Broadcasting System, Inc., 499 F.2d 797 (7th Cir. 1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Miller v. News Syndicate Co., Inc., 445 F.2d 356 (2d Cir. 1971); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, supra; United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969); Meeropol v. Nizer, supra; Lewis v.

Readers' Digest Ass'n., 366 F. Supp. 154 (D. Mont. 1973); Bostic v. True Detective Magazine Co., 363 F. Supp. 919 (S.D.N.Y. 1973); LaBruzzo v. Associated Press, 353 F. Supp. 979 (W.D. Mo. 1973); Kent v. Pittsburgh Press Company, 349 F. Supp. 622 (W.D. Pa. 1972); Cerrito v. Time, Inc., supra. After careful review of the affidavits, depositions and exhibits and following extensive and inordinate discovery by plaintiff, the District Court correctly held that this case was no exception to the general rule.

Both Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) and Guam Federation of Teachers v. Ysrael, 492 F.2d 438 (9th Cir. 1974), cert. denied, 419 U.S. 872 (1974) are not exceptions to any of the principles discussed above. In Goldwater, this Court emphasized the abundance of proof brought out at trial which established that the appellants not only knowingly published defamatory statements of fact but also established with convincing clarity that the appellants were motivated by malice. In its decision, the Court was careful to distinguish such cases as Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968) and Washington Post v. Keogh, supra, thereby reemphasizing the basic

principle that the granting of summary judgment in defamation cases is required to protect defendants' First Amendment rights (414 F.2d at 337 [n. 21]).

Similarly, the Ninth Circuit in Guam was careful to point out the special treatment to be accorded to libel actions where First Amendment freedoms are at stake as follows (492 F.2d at 441):

> "... When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to 'examine for [themselves] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect". To be unprotected, actual malice must be shown with 'convincing clarity.' New York Times, supra, 376 U.S. at 285-286, 84 S.Ct. at 728-729.

Furthermore, the Guam court held that defendant's own testimony, i.e., his admission that he did not know whether what was said was true, that he did not verify his charges, that he knew of no facts to support them, and that he relied on either unspecified rumor or upon nothing at all, was enough to get plaintiffs to the jury under the New York Times standards. These circumstances are far different from those presented herein. It cannot be disputed that Jeffers' review

was simply the comments of a literary critic based upon Property Power.*

In determining that both Goldwater and Guam were inapplicable to the circumstances of this case, the District Court justifiably held:

> "Here, no proof has been presented from which a jury could infer malice; nor are there any competing legitimate inferences that could properly be drawn in plaintiff's favor." (emphasis in text) (A 330

* * *

> "... Since plaintiff has presented no evidence giving rise to any issue of fact as to whether malice actually existed, summary judgment as to the defamation counts is granted on First Amendment grounds as well." (A 332)

In sum, the District Court's opinion and order granting summary judgment to the Westinghouse defendants and Jeffers should be affirmed in view of said defendants' First Amendment rights and plaintiff's complete failure to satisfy her burden under the applicable law and the Federal rules.

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*So, too, the recent opinion of Judge Brieant in the Southern District case of Hotchner v. Castillo-Puche, et al., (74 Civ. 5516)(Nov. 12, 1975) is no support for the proposition asserted by the plaintiff here that the summary judgment granted to Jeffers and the Westinghouse defendants was improper despite the presence of the constitutional privilege. In that case, which held as a matter of law that the plaintiff author of a book was a public figure and hence required to demonstrate actual malice, Judge Brieant found documentary evidence in an exchange of correspondence between the publisher and the defendant author which raised a genuine issue of material fact as to whether the publisher acted with knowledge of falsity or reckless disregard of the truth.

POINT V

PLAINTIFF CONCEDED BELOW THAT SHE HAS NO PROOF OF A VIOLATION OF TITLE 47 U.S.C. §§ 317, 501, 502, 503 AND 508. IN ANY EVENT, NO PRIVATE RIGHT OF ACTION EXISTS UNDER THESE SECTIONS

The third claim of plaintiff, alleging a private cause of action for violation of §§ 317, 501, 502, 503 and 508 of the Communications Act was properly dismissed by the District Court (A 334). Plaintiff bases her claim for a private cause of action on the alleged violation of §317, which prohibits the broadcast of matter by a radio station for which "any money, service or other valuable consideration is directly or indirectly paid, promised to or charged or accepted by the station so broadcasting, from any person" without an appropriate announcement being made to this effect. (App. Br. 62-63).

Thus, the alleged violation relates solely to plaintiff's sham and irresponsible charge of "payola". Despite the extensive burdensome and oppressive discovery by plaintiff, no proof whatsoever was developed of the charge. On the contrary, and as the District Court so found, plaintiff's charges were drawn from sheer speculation and conjecture (A 325). Moreover, plaintiff's tortured and self-serving hypotheses, aptly described as "egregious" by the District Court (A 326), conclude with the concession that "whether Jeffers was paid for his fake 'book review' or whether he did it as a favor for

Yottes, I do not and can not know" (A 212-213). Particularly in the face of this concession, plaintiff's charge of the "payola" conspiracy is necessarily dismissible aside from the legal principle that no private cause of action exists under the Act.

Plaintiff Has No Private Right of Action

Plaintiff's claim here sought to be brought in the first instance in the District Court is both unprecedented and improper. The Federal Communications Commission ("F.C.C.") is the primary and exclusive forum in which a private litigant can institute and prosecute alleged violations of the Act concerning the broadcasting industry. Gordon v. National Broadcasting Company, Inc., 287 F. Supp. 452 (S.D.N.Y. 1968); Nelson v. Leighton, 82 F. Supp. 661 (N.D.N.Y. 1949). The federal court's sole function with respect to such private claims is to review and enforce final orders of the F.C.C. Ackerman v. Columbia Broadcasting System, Inc., 301 F. Supp. 628 (S.D.N.Y. 1969); Gordon v. National Broadcasting Company, supra; Massachusetts Universalist Convention v. Hildreth & Rogers Co., 87 F. Supp. 822 (D.C. Mass. 1949), aff'd, 183 F. 2d 497 (1st Cir. 1950).

The District Courts will exercise jurisdiction in

cases brought for alleged violations of the sections at issue only in those actions brought by the government to exact a forfeiture or other criminal penalty. See, e.g., United States v. Vega, 447 F. 2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 1038 (1972); United States v. Midwest Radio-Television Inc., 249 F. Supp. 936 (D. Minn. 1966); United States v. WHAS, Inc., 253 F. supp. 603 (W.D. Ky. 1966), aff'd 385 F. 2d 784 (6th Cir. 1967).

No private right of action exists under these sections of the Communications Act either by statutory expression or by necessary implication. Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4, 14 (1942) ("The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications"); Daly v. West Central Broadcasting Co., 201 F. Supp. 238 (S.D Ill. 1962), aff'd 309 F. 2d 83 (7th Cir. 1962); Ackerman v. Columbia Broadcasting System, Inc., supra; Gordon v. National Broadcasting Company, supra. The provisions of the Act applicable to the broadcasting media were specifically enacted in the general public interest to protect against injury to the listening public as a whole and not specific persons. Thus, the Act provides significant and exclusive responsibilities to the F.C.C. as the statutory guardian of the public interest.

That Congress enacted §317, as amended in 1960, to protect the public at large and not specific individuals is clear:

> "The congressional intent in enacting Section 317 of the Communications Act and similar antecedent legislation was clearly to prevent deception on the part of the public growing out of concealment of the fact that the broadcast of particular program material was induced by consideration received by the licensee." H. R. Rep. No. 2148, 86th Cong. 2d Sess. Appendix C. 2 United States Code Congressional and Administrative News at 3541 (1960) (emphasis supplied).

In Ackerman v. Columbia Broadcasting System, Inc., supra, Judge Weinfeld ruled with respect to a complaint brought under Section 315(a) of the Act as follows (301 F. Supp. at 631):

> " . . . However, the complaint, insofar as it rests upon Section 315(a) of the Act, fails to state a claim upon which relief can be granted. Neither the Act in general nor Section 315(a) in particular, created new private rights or authorized suits to recover damages. The enforcement of Section 315(a) and the vindication of the public interest are vested in the Federal Communications Commission." (footnotes omitted)

In Daly v. West Central Broadcasting Co., supra, the District Court held (201 F. Supp. at 240-41):

> "In addition to the provisions for administrative enforcement of the Act,

> Sections 501 and 502 provide for penal sanctions against persons who willfully violate the Act or regulations lawfully promulgated by the FCC pursuant thereto. 47 U.S.C.A. §§ 501, 502. But no provision of the Act creates, either by expression or necessary implication, any private right of action which is cognizable, in the first instance, by the district courts.
>
> "In the absence of congressional expression of intent to the contrary, the power granted to the FCC to enforce the Act and to regulate broadcasting and the power of enforcement by penal sanctions are conclusive. Cf., Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 375, 377, 78 S. Ct. 352, 359, 2 L. Ed. 2d 340." (footnote omitted)

The Seventh Circuit in affirming the District Court opinion and expressly distinguishing the Fitzgerald* case relied on by plaintiff here reiterated these principles as follows (309 F. 2d at 85):

> "There is no provision in Sec. 315(a), or in any other part of the Act, which gives a private individual a cause of action to recover damages for an alleged violation of the Act. In the twenty-eight years since the enactment of the Act, no court, as far as we are advised, has ever held that a private individual had a right of action against a licensee to recover damages for a violation of Sec. 315(a).
>
> * * *
>
> "In Fitzgerald, the Court held (229 F. 2d p. 501) the statute [Section 464(b) of the

* Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (2d Cir. 1956).

> Civil Aeronautics Act] was 'enacted for the protection of a specified class' and that it created a civil right in members of that class for the vindication of which a civil action could be maintained.
>
> "However, Sec. 315(a) of the Act now before us, is of a different character. No private right is created for a candidate for a public office. The basic purpose of the Act is regulation in the public interest and not the creation of private rights."

It is plaintiff's burden to demonstrate that the Act confers upon her a private right of action. Sims v. Parke Davis & Co., 334 F. Supp. 774, 791 (E.D. Mich.), aff'd 453 F. 2d 1259 (6th Cir. 1971), cert. denied, 405 U.S. 978 (1972). Where, as here, statutes are enacted to protect the interests of the state or to protect the general public, implication of such a right is improper. Cooper v. North Jersey Trust Co., 226 F. Supp. 972, 979 (S.D.N.Y. 1964).

Under the foregoing authorities, it is clear that, as the District Court so found (A 334), no private right of action should or does exist under Section 317 of the Act. Moreover, such an action would be needless since plaintiff has the benefit of a common law action in defamation which was concurrently asserted in this action and forms the entire substantive basis thereof. Cf. Chavez v. Frespict Foods, Inc., 456 F. 2d 890 (10th Cir.), cert. denied, 409 U.S. 1042 (1972).

Plaintiff's Authorities

The several decisions cited by plaintiff are inapposite and clearly distinguishable from the case herein. In each case, a federal statute or constitutional provision was found to have been enacted to protect a specified class; in some cases, constitutional rights were violated.* Other cases relied on by plaintiff involved claims under the Rivers and Harbors Act of 1899 brought by the United States government not by private individuals. Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967); United States v. Perma Paving Co., Inc., 332 F. 2d 754 (2d Cir. 1964). In Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) the Supreme Court held that state law rather than federal law governed a controversy involving oil and gas leases issued under the Mineral Leasing Act of 1920.

Plaintiff's reliance upon Reitmeister v. Reitmeister, 162 F. 2d 691 (2d Cir. 1947), which implied a right of action under Section 605 of the Communications Act, is also misplaced. Section 605 (which deals with point to point communications services) prohibits the unauthorized inter-

* For example, in J. I. Case Co. v. Borak, 377 U. S. 426 (1964) the Supreme Court found that among the chief purposes of Section 14(a) of the Securities & Exchange Act was the protection of investors; in Deitrick v. Greaney, 309 U.S. 190

ception and divulgence of non-public communications and has no application to radio broadcasts intended for the general public. United States v. Sugden, 226 F. 2d 281 (9th Cir. 1955), aff'd, 351 U.S. 916 (1956); United States v. Fuller, 202 F. Supp. 356 (N.D. Cal. 1962). Furthermore, Reitmeister found that plaintiff, whose private telephone conversation was intercepted and divulged, was within the specific class of persons whose privacy is protected by the statute. On the other hand, Section 317 of the Act protects the general public, not a specific class, and the F.C.C. is the exclusive forum wherein a private claim for an alleged violation of this provision can be brought. Thus, complaints arising under Section 317 are to be heard in administrative proceedings before the F.C.C. See, e.g., In Re Lotus Broadcasting Corp., 9 F.C.C. 2d 227 (1967); In Re Southwestern Broadcasting Co., 9 F.C.C. 2d 224 (1967); In Re Las Vegas TV, Inc., 8 F.C.C. 2d 1061 (1967).

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* (cont'd)
(1940) the Supreme Court held that the National Banking Act was designed to protect creditors of a bank; in Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, 323 U.S. 210 (1944), the Supreme Court held that the Railway Labor Act protected minority members of a craft union; in Fitzgerald v. Pan American World Airways, 229 F. 2d 499 (2d Cir. 1956), the Court held that Section 484(b) of the Civil Aeronautics Act of 1938 was enacted for the benefit of air passengers; and in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court found a federal cause of action stated where a violation of Fourth Amendment rights is alleged.

Plaintiff's contention that Daly, supra, is at odds with Weiss v. Los Angeles Broadcasting Co. 163 F. 2d 313 (9th Cir. 1947) is inappropriate. The District Court in Daly rejected Weiss only to the extent that the case may have carried the implication that a private right of action existed because of its finding that subject matter jursidiction was present under Title 47, U.S. Code. In fact, the Weiss court affirmed the dismissal of the complaint upon motion under Rule 12(b)6 for failure to state a cause of action under the Act. Further, plaintiff's brief makes no reference to the affirmance of the District Court's opinion in Daly by the Seventh Circuit in a full opinion, holding that no private right of action existed under "Sec. 315(a), or in any other part of the Act" (309 F. 2d at 85) and stating that Weiss was not an equal time case under 315(a) (Id.).

Plaintiff's argument that the sections at issue should be interpreted in the context of this case (App. Br. 62) is meaningless. No private right of action is created by Section 317. Moreover, she concedes she has no proof of any violation of the statute. Nor do the authorities cited by plaintiff in this regard give any support to her claim. Indeed, in Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F. 2d 486 (2d Cir. 1968), the court merely held

that there was subject matter jurisdiction because the claims asserted against a common carrier required application of federal common law. With respect to the Communications Act, the Court held that Sections 206 and 207 (which do expressly permit a private action for damages for certain claims) did not confer jurisdiction since no violation of the Act was stated and that the right to recover for the breach of contract and negligence there alleged could not be inferred from the Act (391 F. 2d at 489).

So, too, in Felix v. Westinghouse Radio Station, Inc., 186 F. 2d 1 (3d Cir. 1950), plaintiff sued only in libel, not under the Communications Act. Section 315(a) was interposed as a defense and not as a basis of any claim for relief (see Daly v. West Central Broadcasting Co., supra, 201 F. Supp. at 241).

In sum, plaintiff's contentions border on the frivolous when we consider that plaintiff's claim as to Jeffers and the Westinghouse defendants is simply one in defamation based on a review of plaintiff's book by a literary critic. No private right of action should be permitted plaintiff here for each and every one of the following reasons: plaintiff has conceded she has no proof of the alleged violation; the F.C.C. is the primary and exclusive forum for the

alleged violation; the Act is intended to protect the general public and the interests of the state; and there is no "specific class" to be protected by Section 317 of the Act.

Plaintiff Has No Cause of Action for Civil Conspiracy

Aside from the foregoing principles, we note that it is also well established law that no cause of action can exist for civil conspiracy since there is no substantive tort of conspiracy. Rosemont Enterprises Inc. v. Random House Inc., 261 F. Supp. 691 (S.D.N.Y. 1966); Edelman v. Federal Housing Admin. 251 F. Supp. 715, 717 n. 1 (E.D.N.Y. 1966), aff'd, 382 F. 2d 594 (2d Cir. 1967); Wood v. Amory, 105 N.Y. 278, 11 N.E. 636 (1887); Routsis v. Swanson, 26 A.D. 2d 67, 270 N.Y.S 2d 908 (1st Dep't 1966); Goldstein v. Seigel, 19 A.D. 2d 489, 493, 244 N.Y.S. 2d 378, 382 (1st Dep't 1963); Klein v. Federation Bank & Trust Co., 36 Misc. 2d 885, 232 N.Y.S. 2d 880(Sup. Ct. Kings Co. 1962). Further, although no claim is asserted against the Westinghouse defendants and Jeffers for the republication of the book review together with quotes attributed to plaintiff by other defendants, we note the well settled rule in libel that "the original publisher of a libel is not responsible for its subsequent publication by others", a rule quoted with approval in Macy v. New York World Telegram Corp., 2 N.Y. 2d 416, 422, 161 N.Y.S. 2d 55, 60, (1956).

CONCLUSION

The order and judgment of the District Court should be affirmed for any one of the following reasons: (1) the review is non-defamatory of plaintiff; (2) the review is fair comment upon plaintiff's book; or (3) the review is constitutionally privileged. Moreover, plaintiff failed to satisfy her burden under the Federal Rules and the applicable law of showing by admissible evidence the existence of any genuine issue of material fact as to either of the claims against the Westinghouse defendants or Jeffers. In addition, no right of action exists in this case under the Communications Act. Plaintiff's claims against the Westinghouse defendants and Jeffers were properly dismissed by the District Court.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DONALD S. FELDMAN, being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides at 251 West 70th Street, New York, New York.

That on November 26, 1975 I served the attached Brief for Defendants-Appellees Westinghouse Electric Corp., Westinghouse Broadcasting Co., Inc. (Del.) and H. Paul Jeffers upon Cerchiara & Cerchiara, attorney for defendant-appellee Yottes, by placing two copies of the brief in a post-paid envelope and mailing the same to Cerchiara & Cerchiara, 145 Mount Vernon Avenue, Mount Vernon, New York 10550, by depositing it with the U. S. Postal Service at one of their official post offices within the State of New York.

Donald S. Feldman
DONALD S. FELDMAN

Sworn to before me this
26th day of November, 1975.

John C. Scannell
Notary Public

JOHN C. SCANNELL
NOTARY PUBLIC, State of New York
No. 31-4507768
Qualified in New York County
Commission Expires March 30, 1977